No. 73-1116

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN PHILLIP LA GIOIA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner John Phillip La Gioia prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on December 4, 1973.

Opinion Below

Pursuant to Local Rule 21 of the United States Court of Appeals for the Fifth Circuit, (Appendix A, infra.) Petitioner's conviction was affirmed without opinion. A copy of the Court's order affirming Petitioner's conviction is reprinted as Appendix B, infra.

Jurisdiction

The judgment of the Court of Appeals (Appendix C, infra.) was entered on December 4, 1973. A petition for rehearing was not filed. On December 28, 1973, the Honorable Justice Lewis F. Powell, Jr., signed an order extending the time for filing the instant Petition to and including January 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented for Review

Where multiple defendants are represented by a single attorney in a joint conspiracy trial, and the interests of one co-defendant are so potentially adverse to the interests of the other co-defendants that all cannot be effectively represented by the same attorney, does the Sixth Amendment to the Constitution of the United States require the trial court to examine the attorney and the co-defendants to determine whether a conflict of interests exists, and whether the co-defendants understand and waive all rights in connection therewith?

Was the Petitioner denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States?

Statement of the Case

Petitioner John Phillip La Gioia was indicted with William Wroda, Barbara Scubak, and Alejo Garza by the United States Grand Jury for the Southern District of Texas. Count one of the three count indictment charged that Petitioner conspired with Wroda, Mrs. Scubak and Garza to "unlawfully possess, with intent to distribute, a quantity of marijuana * * * in violation of Sections 846 and 841(a)(1),Title 21, United States Code." Count Two

alleged that Petitioner and the co-defendants knowingly imported approximately 411 pounds of marijuana into the United States from Mexico, in violation of Section 952(a) of Title 21 of the United States Code. Count Three charged that Petitioner and the other co-defendants knowingly and intentionally possessed, with the intent to distribute, approximately 411 pounds of marijuana in violation of Section 841(a)(1) of Title 21, United States Code.

Petitioner, Wroda and Mrs. Scubak were tried together before a jury. Alejo Garza, the remaining co-defendant, was a fugitive at the time of trial. Each was represented by the same privately retained attorney, and no inquiry was made by the trial judge either during trial or at sentencing as to whether a conflict of interest existed between the defendants, or whether the defendants understood the possibilities of a conflict in their defenses and knowingly acquiesced in the joint representation.

Petitioner and his co-defendants were found guilty on all counts of the indictment, and Petitioner was sentenced to concurrent five year terms upon each of the three counts.

Testimony at Trial

On July 25, 1972 Petitioner was traveling from Chicago to McAllen, Texas. While changing planes at Love Field in Dallas, Texas, his baggage was searched by two United States Customs Agents acting as airport security guards. The agents found approximately $9,000 in currency in his suitcase. After briefly detaining Petitioner the agents permitted him to board the plane for McAllen, but alerted customs agents in McAllen who followed Petitioner upon his arrival there.

La Gioia was met at the airport by William Wroda and Mrs. Scubak in a 1972 Ford bearing a Texas license number JZH 294. They drove Petitioner to the Fairway Motel in McAllen, where they remained until later that evening

when they all drove to Hidalgo, Texas, a port of entry into Mexico. They parked the car on the American side of the border, and entered Mexico by taxicab.

Petitioner, Wroda and Mrs. Scubak returned to the American side of the border several hours later, and drove the car back to the motel. Shortly thereafter the car they had been using was driven from the motel parking lot by Alejo Garza, the co-defendant who was a fugitive at the time of trial.

Customs agents followed Garza as he drove to Abrams, Texas. Garza drove into a field which abutted the Rio Grande River, and remained in the field with his car lights out for approximately one hour. He then drove back to McAllen, and was arrested when he parked in a residential area of the city.

Garza's car was searched, and approximately 411 pounds of marijuana was found in the trunk. A description of highway routes between McAllen and Chicago was found on Garza's person. Garza told the arresting agents that neither Petitioner, Wroda nor Mrs. Scubak had knowledge of the marijuana, and that it belonged to him.

Petitioner, Wroda and Mrs. Scubak were arrested in their motel rooms the following morning. Mrs. Scubak had in her possession an Illinois traffic citation issued to her while driving a car shown to have been registered to Alejo Garza.

William Wroda was shown to have been a passenger in Garza's car when Mrs. Scubak received the ticket. When he was arrested in McAllen, Wroda had in his possession a revolver which was shown to have been purchased in McAllen by Alejo Garza. Wroda also had in his possession a piece of paper bearing the name and telephone

number of a bar in Guadalajara, Mexico, which Wroda was shown to have telephoned twice from his motel room.

Petitioner, a Chicago resident, testified that he had never met Alejo Garza, and had no knowledge of the marijuana found in Garza's car. He said that as a favor to Wroda he had been accumulating cash receipts from Wroda's business, and that in a telephone call from McAllen on July 24, 1972, Wroda requested that he bring the money from Chicago to McAllen. Petitioner stated that upon arriving in McAllen on July 25, he turned the money over to Wroda.

Wroda testified that he had known Alejo Garza previously in Chicago, having hired him as a laborer on several construction jobs. He said that he had come to McAllen with Mrs. Scubak, whom he intended to marry, to investigate the purchase of some real estate. Wroda said he drove to McAllen with Mrs. Scubak's sister and her boyfriend, Bill Snyder, in Snyder's car and that Mrs. Scubak flew down to meet them on or about July 21. He said he had asked Petitioner to bring him cash for use in purchasing land, but that he changed his mind about the purchase after Petitioner arrived in McAllen, and sent the money back to Chicago with Bill Snyder and Mrs. Scubak's sister on the night of July 24. Wroda said he met Alejo Garza coincidentally in McAllen, and that Garza loaned him the 1972 Ford he had been driving. He said that he requested that Garza purchase a gun for him to take back to Chicago because only a Texas resident could purchase a firearm.

The manager of the Fairway Motel testified that on July 20, 1972 a room was registered to Wroda, and another to a William L. Snyder who checked out on July 25. He said that no car was registered to Snyder's room, but that

a 1972 Ford bearing Texas license number ZWY 417 was registered to Wroda's room.

Evidence was introduced by the government that license number ZWY 417 had never been issued by the State of Texas.

Mrs. Scubak essentially corroborated the testimony of Petitioner and Wroda.

Sentencing and Post-Sentencing Proceedings

Prior to sentencing the attorney representing Petitioner, Wroda and Mrs. Scubak filed a "Motion to Arrest Judgment" on behalf of Petitioner, stating in part:

> "That defendant William Earl Wroda is willing to appear before the court to recant the testimony heretofore made before this Honorable Court and that this defendant [Petitioner] verily believes that such recantation will absolve this defendant from all guilt of the charges upon which the jury herein found him guilty." (R. 5)

It does not appear of record whether the motion was acted upon.

At sentencing, both Petitioner and Wroda recanted their trial testimony. Petitioner stated that he had lied in testifying that the money which he had brought to McAllen came from Wroda's construction business, and admitted that it had been given to him by Wroda. Petitioner maintained, however, that he did not know that the money was to be used to purchase marihuana until sometime after he had arrived in McAllen and given the money to Wroda.

Petitioner's attorney told the Court, "I know he told lots of lies in this courtroom, your Honor, but I think there was some reason for it."

Wroda admitted that Alejo Garza had given him the money which Petitioner brought to McAllen, and said that Garza had promised him $2500.00 if he would drive his car from McAllen to Chicago. He added that when Petitioner arrived in McAllen and learned the use to which the money was to be put, Petitioner urged him to abandon the venture.

Following sentencing, motions for reductions of sentence were filed on behalf of Petitioner and Wroda. Petitioner's affidavit, submitted in support of his motion, stated that he did not know that the currency he brought from Chicago to McAllen was to be used to purchase mariuhana, and that when he did so learn, he attempted to divorce himself from any involvement in the scheme. Petitioner's affidavit stated, in part:

> "I did lie during the trial of this case. But this was to protect my friend William Earl Wroda. I just didn't believe that what I knew or said during the trial was important." (R. 7)

Reasons For Granting The Writ

This Petition seeks review of what one jurist has termed, "the vexing problem of counsel for co-defendants in criminal cases." *Ford* v. *United States,* 379 F.2d 123 (D.C. Cir. 1967) (Wright, C.J.). Petitioner, John Phillip La Gioia, was tried and convicted with two co-defendants for conspiracy and two substantive violations of the Drug Abuse Prevention and Control Act, 21 U.S.C. Petitioner and two co-defendants were represented by a single privately retained attorney at trial, and all pursued a common defense.

However, in post trial motions and affidavits submitted in support thereof, it became manifest that Petitioner's interests were in direct conflict with those of his co-defendants, and that his interests had been sacrificed at trial.

This Court last addressed the issue of joint representation by a single attorney as constituting a denial of Sixth Amendment guarantees in *Glasser* v. *United States,* 315 U.S. 60 (1942). There the Court reversed a conviction on grounds that the defendant Glasser had been denied the effective representation of counsel when the trial court appointed a single attorney to represent both he and a co-defendant, after the inconsistent interests of Glasser and the co-defendant were "brought home" to the trial court.

Since *Glasser,* the federal circuits have divided sharply over the correct procedure when a trial court is confronted with a single attorney representing multiple defendants. The District of Columbia, First and Second Circuits have ruled that in such a situation the trial court must inquire of counsel and the defendants as to whether a

potential conflict of interest exists in the joint representation, whether the defendants thoroughly understand the potential for conflict, and whether the defendants knowingly waive their rights in connection therewith.[1] The remaining federal circuits, however, require no such inquiry by the trial judge, and instead place the burden upon the defendants to show prejudice resulting from the joint representation.

In *Campbell* v. *United States*, 352 F.2d 359 (D.C. Cir. 1965), the United States Court of Appeals for the District of Columbia Circuit first placed the burden upon the trial court, "to assure that co-defendants' decision to proceed with one attorney is an informed decision." 352 F.2d at 361. In *Lollar* v. *United States*, 376 F.2d 243 (D.C. Cir. 1967), that Court further required that the trial court's advice to the co-defendants with respect to proceeding with a single attorney must appear on the face of the record, and stated that if the decision of co-defendants to proceed with a single attorney was not an informed act, the burden shifted to the government to demonstrate that the denial of the defendants' rights was harmless error. See also, *Ford* v. *United States*, 379 F.2d 123 (D.C. Cir. 1967)

In *United States* v. *Foster*, 469 F.2d 1 (1st Cir. 1972), the United States Court of Appeals for the First Circuit also determined that the constitutional guarantee of effec-

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[1] Congress has recognized the danger of deprivation of the effective assistance counsel inherent in joint representation of multiple defendants. Section 3006A(b) of the Criminal Justice Act, 18 U.S.C., provides in part, "the court *shall* appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel." (emphasis added)

tive assistance of counsel required that a decision to proceed with joint counsel be an informed and intelligent act. In the exercise of its supervisory powers, the Court promulgated a rule requiring district judges,

> "as early in the litigation as practicable, to comment on some of the risks confronted where defendants are jointly represented to insure that defendants are aware of such risks, and to inquire diligently whether they have discussed the risks with their attorney, and whether they understand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court * * *." *United States* v. *Foster*, 469 F.2d 1, at 5.

Most recently in *United States* v. *DeBerry*, ... F.2d ....., (2d Cir. 1973), 14 Cr. L. Rpt. 2224, the United States Court of Appeals for the Second Circuit adopted a rule requiring trial courts to inquire at the outset of the litigation whether jointly represented defendants may have conflicting defenses and, if so, whether they knowingly consent to joint representation. See also, *United States* v. *Alberti*, 470 F.2d 878, 881-2 (2d Cir. 1972).

The American Bar Association Standards Relating to the Defense Function also recognize the potential for prejudice inherent in joint representation, and, like the District of Columbia, First and Second Circuits, urge that the informed consent of jointly represented co-defendants be obtained prior to trial. Section 3.5(b) of that Standard states:

> "Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of in-

> terest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

In marked contrast to the rules promulgated by the District of Columbia, First and Second Circuits, and the view expressed in the American Bar Association Standards Relating to the Defense Function, the remaining federal circuits do not require inquiry by the trial court as to whether the co-defendants' decision to forego individual representation is an informed act. See, e.g., *Galvin* v. *United States,* 396 F.2d 725 (9th Cir. 1968), where the Court affirmed a conviction after the trial judge had denied the motion of defense counsel to be relieved from representing one of two co-defendants on grounds of a potential conflict; and *Curry* v. *Burke,* 429 F.2d 158 (7th Cir. 1970), where co-defendants were not advised of the potential conflict in joint representation, and the Court nevertheless put the burden upon them to demonstrate by "clear and convincing evidence" that a conflict existed.

The Fifth Circuit, as demonstrated by the instant case, does not require the trial court to determine whether the decision of a jointly represented co-defendant to forego individual representation is an informed act. Here Petitioner proceeded to trial sharing an attorney with two co-defendants, never having been advised by the trial court that a potential for conflict existed in joint representation, and that he could have an independent attorney if desired. Petitioner's attorney put forth a common defense for all the co-defendants, never asserting for Petitioner the

independent, viable defense that he had no knowledge of a plan to import marijuana until after he arrived in McAllen, at which time he divorced himself from any participation in the scheme.

Certainly had Petitioner been independently represented he would have followed a different course, for while the prosecution could circumstantially link Garza to Wroda and Mrs. Scubak, no connection was ever shown between Garza and Petitioner.

That is, the prosecution showed that Wroda and Mrs. Scubak had known Garza previously in Chicago, and had once borrowed Garza's car. The car which Wroda and Mrs. Scubak drove in McAllen had been borrowed from Garza, and was subsequently used by Garza to transport the marijuana. Finally, when arrested Wroda had in his possession a pistol which had been purchased in McAllen by Garza. These circumstantial links between Wroda, Mrs. Scubak and Garza played a significant part in their convictions. The conviction of Petitioner inevitably followed because given their common defense and joint representation, the jury could not help but view all three as an entity.

Only after trial did Petitioner attempt to disengage himself from Wroda and Mrs. Scubak. The post-trial motions of he and Wroda stated that Petitioner had no knowledge of the scheme to import marijuana when he brought the currency to McAllen, and that Petitioner lied at trial to protect Wroda. The attorney who represented Petitioner and his co-defendants credited these post-trial statements, telling the Court, "I know [Petitioner] lied, Your Honor, but I think there was some reason for this."

Beyond doubt, had Petitioner been independently represented at trial and pursued an independent defense, he

would have been more effectively represented. Yet there is nothing in the record to indicate that Petitioner was ever advised that his interests conflicted with those of his co-defendants, and that joint representation could result in the subjugation of those interests and an impairment of his right to the effective assistance of counsel.

Under the practices adopted in the First, Second, and District of Columbia Circuits, Petitioner would have been so advised. Here, Petitioner proceeded to trial jointly represented in the absence of an explanation of the attendant dangers, and did not receive the effective assistance of counsel. We urge the Court to take this opportunity to establish a uniform procedure for trial courts, implementing the guarantee of the effective assistance of counsel, when multiple defendants are represented by a single attorney.

Conclusion

For the above and foregoing reasons, we respectfully submit that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

Respectfully submitted,

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